(8)

No. 95-860

In The

Supreme Court of the United States

October Term, 1995

BARBARA SMILEY,

Petitioner,

vs.

CITIBANK (SOUTH DAKOTA), N.A.,

Respondent.

On Writ of Certiorari to the California Supreme Court

BRIEF OF AMICUS CURIAE BANKCARD HOLDERS OF AMERICA IN SUPPORT OF PETITIONER

KENNEDY P. RICHARDSON
Counsel of Record
SAM WALKER
ALBERT LEE
MARION'S INN
Attorneys for Amicus Curiae
Bankcard Holders of America
Latham Square
1611 Telegraph, Suite 707
Oakland, California 94612-2145
(510) 451-6770

8393
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

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PARTIES' CONSENT FOR FILING THIS BRIEF AS AMICUS CURIAE

Both petitioner and respondent have consented to the filing of this brief pursuant to Rule 37(3)(a).

AMICUS' INTEREST AND SUMMARY OF ARGUMENT

Bankcard Holders of America ("Bankcard") submits this brief in support of petitioner Barbara Smiley.

Bankcard is a national, non-profit organization dedicated to consumer credit education and advocacy. Founded in 1980, Bankcard has a current membership of more than 25,000 individual consumers. Bankcard receives no financial support from the banking or credit industry. Instead, it relies on membership dues, charitable donations and publication sales. In addition to its bi-monthly newsletter reporting on credit industry practices and credit card opportunities, the organization has published and distributed educational pamphlets for credit card consumers such as "Consumer Credit Rights" and "Credit Cards: What You Don't Know Can Cost You!"[1]

Bankcard submits this brief because it believes that section

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1. Bankcard's counsel are well acquainted with the legal issues in this case because of their representation of the plaintiffs in a pending class action filed in California state court that challenges the late fees charged by Greenwood Trust, the issuer of the "Discovercard." (*Cynthia St. John, et al. v. Greenwood Trust*, County of Alameda, Case No. 695111-5). Although the *St. John* complaint successfully withstood a federal preemption challenge under § 521 of DIDA, the action has been stayed by stipulation pending this Court's expected resolution of the preemption issue. The *St. John* plaintiffs participated as amici curiae on behalf of petitioner Smiley when this case was before the California Supreme Court.

85 of the National Bank Act, 12 U.S.C. § 85, and section 521 of the Federal Depository Institutions Deregulation and Monetary Control Act of 1980 ("DIDA"), 12 U.S.C. § 1831d(a), are being used to eradicate volumes of state laws that have protected credit card holders from overreaching by large financial institutions. These state laws, both common law and statutory, prevent banks from exacting unbargained-for penalties from cardholders that far exceed the losses that the banks have suffered as a result of the cardholders' breaching the contracts by making late credit card payments. These state laws reflect the states' exercise of their historical power to protect their citizens from unlawful *penalties.* They do not purport to regulate the "interest" terms of the cardholder contract that set the price that banks charge for the credit that they sell to cardholders.

The central legal issue in this case is whether the Civil War Congress intended the term *rate of interest* in § 85 to refer to a liquidated penalty for a late loan payment. Bankcard's brief offers the Court two different perspectives on this issue. Part II of this brief discusses the historical meaning of the term interest in both common usage and the early legal precedents that set the stage for § 85 and construed the statute after its enactment. Although the historical evidence is not conclusive, it furnishes persuasive proof that the Congress of 1864 only undertook to create a preemptive shield against discriminatory state usury laws that placed national banks at a competitive disadvantage in terms of the price they could charge for the use of their money.

This historical view of § 85 comports with the internal logic of the statute. Section 85 allows a national bank to charge the higher of two *rates*: the rate of interest allowed by the law of its home state or an adjusted Federal Reserve Bank discount rate. An interpretation that defines "interest" as including liquidated penalties is unworkable because it is impossible to compare either the home state's usury rate or the adjusted federal discount

rate with the unpredictable late charges that are contingent on future breaches of the loan contract.

Part III approaches the same issue by examining § 85's modern descendent, § 521 of DIDA. Section 521, which was enacted in 1980, was unquestionably designed to extend the same protection that national banks have under section 85 to state chartered banks. Because the legislative history of § 521 is understandably more extensive than the limited record concerning § 85, the congressional intent behind § 521 offers an invaluable insight into the meaning of the earlier statute on which it was modelled. This modern legislative development confirms that both §§ 85 and 521 were enacted to create a level playing field of usury limitations on the prices that national and state banks charge for the use of their money in the credit marketplace. These federal statutes have no bearing on the states' traditional power to regulate liquidated penalties, fraudulent offers of get-a-way vacation packages to promote credit card sales, and other non-price aspects of the bank-cardholder relationship.

ARGUMENT

I.

THE WORDS "INTEREST AT THE RATE" IN 12 U.S.C. § 85 DO NOT INCLUDE CONTINGENT PENALTY FEES SO AS TO PREEMPT CALIFORNIA LAW.

A. The Historical And Common Definition of "Interest" Excludes Penalty Charges.

The California Supreme Court applied an expansive definition of interest that is at odds with the ordinary meaning of the term that arose long before the passage of the National Bank Act and has persisted ever since. Contemporaneous 19th

Century dictionaries suggest that "interest" was not understood at that time to include late fees or other penalty charges; rather, interest was limited to a periodic rate. *See* Wharton's Law Lexicon 391 (2d ed. 1860) ("Interest, the sum of money paid or allowed for the loan or use of some other sum, lent for a certain time, according to a fixed rate"); Bouvier's Law Dictionary 652 (4th ed. 1852) ("Interest for money, contracts: The compensation which is paid by the borrower to the lender or by the debtor to the creditor for its use").

These definitions make it quite likely that the 38th Congress understood that the word "interest" pertains to the time-value of money. Interest is contra-distinguished by the sum-certain late fees or "penalty fees" imposed by the respondent here in that the latter are not compensation for the use or forbearance of money, but instead are punishment charges beyond the time-value of money which are in addition to the continuing finance charges imposed.

B. Federal Common Law Requires A Time-Based Measure Of Interest.

There is no indication that Congress intended "interest" in § 85 to be different from the common law meaning of the term. Further consideration of the historical context beyond dictionaries demonstrates that Congress and the common law have always considered "interest" to be measured by time.

On at least two occasions before passage of the National Bank Act in 1864, this Court held that contingent default charges, like late fees, were not "interest." *See Lloyd v. Scott*, 29 U.S. (9 Pet.) 205 (1830) and *Spain v. Hamilton's Administrator*, 68 U.S. (1 Wall.) 604, 626 (1863).

Thus, the federal common law had established a definition of the term "interest" even before the National Bank Act was

passed. All contingent loan charges that were specific sums not measured by time and which could be avoided by the borrower were considered to be penalties, not "interest." *Lloyd*, 29 U.S. at 226. The established common law, therefore, distinguished between time-based interest charges and contractual penalties within the borrower's control. The latter were not considered "interest."[2] *See Hahn v. Hank's Ambulance Service, Inc.*, 787 F.2d 543, 544 (11th Cir. 1986) (late charges are different from interest rate finance charges). Since Congress is presumed to have adopted the federal common law meaning of "interest" in enacting § 85, that statute cannot be construed to encompass contractual penalty charges within the borrower's control, such as the fees assessed by the respondent.

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2. This distinction has continued to the present. In the Truth-In-Lending Act, 15 U.S.C. §§ 1601, *et seq.* ("TILA"), Congress defined "finance charges" (a term including "interest") to *exclude* "delinquency charges." In *Johnson v. McCrackin-Sturman Ford, Inc.*, 527 F.2d 257 (3d Cir. 1975), the Third Circuit recognized that there was a difference between the two terms, "finance charges" and "delinquency charges," and that historically Congress was well aware of the difference:

> [P]rior to enactment of the [TILA], the terms "default charges" and "delinquency charges" had well established meanings in the commercial credit field and in other consumer credit legislation, *and it is certain that Congress was well aware of these definitions.* In the commercial credit field and in other consumer credit legislation, the terms "delinquency charges" and "default charges" generally refer to specific pecuniary sums that are assessed against the borrower solely because of his failure to make his payments in a timely manner. They are sums above and beyond the amount ordinarily due in the event of timely payment.

Id. at 265-66.

Indeed, the common understanding around the passage of the National Bank Act distinguished "interest" from post-loan "penalty" charges. *See Mazaika v. Bank One, Columbus, N.A,* 439 Pa. Super. 95, 653 A.2d at 654-56 (Cirillo, J., concurring), *alloc. granted,* 659 A.2d 557 (Pa. May 25, 1995). In the first case addressing the issue after the National Bank Act was passed, a United States Circuit Court affirmed a district court holding that a provision in a note imposing collection costs after a loan default was "a stipulation for a penalty or forfeiture [under common law] . . . and void." *Merchants' Nat'l Bank v. Sevier,* 14 F. 662, 663 (C.C. E.D. Ark. 1882).

In *Merchants',* the district judge, with whom the Circuit Court fully agreed, directly considered the power of national banks to impose post-default collection costs. Relying on this Court's decision in *National Bank v. Johnson,* 104 U.S. 271 (1881), the court rejected the argument that a national bank could charge collection costs as "interest." 14 F. at 665.

Consistent with that precedent, the court reasoned that rates charged by national banks were limited to the standard commercial usage and practice of banks. *Id.* Because stipulations for collection costs after a loan default were "contrary to the usage and practice of banks," the bank could only recover the principal and interest on the loan, not the contractual penalty. *Id.* at 667.

Merchants' also demonstrates that Congress could not have intended "interest" to include contractual penalties. Late charges had always been and continue to be considered distinct from interest. *See Lloyd v. Scott,* 29 U.S. (9 Pet.) 205 (1830); *Spain v. Hamilton's Administrator,* 68 U.S. (1 Wall.) 604, 626 (1863); *United States v. Texas,* 113 S. Ct. 1631, 1634-36 (1993); *Garrett v. Coast & So. Fed. S&L Ass'n,* 9 Cal. 3d 731, 511 P.2d 1197 (1973). Where, as with late charges, the borrower could

avoid the additional charge by paying on time, the common law treated the charge as a contractual penalty, *i.e., nomine poenae* or *interesse poenae,* that was outside the scope of the usury statutes. *See, e.g., Lloyd,* 29 U.S. at 226; *Ramsey v. Morrison,* 39 N.J.L. 591, 593 (1877).

As in *Lloyd v. Scott,* respondent's penalty charges represent specific sums which may be avoided by a punctual payment. Unlike the respondent's time-based interest charges, the fees are not compensation for a loan of money. Instead, they are "penalties" for an avoidable contractual breach. Thus, respondent's default charges are not "interest" within the common law meaning of that term as it was used by Congress in the National Bank Act.

C. Respondent's Interpretation of § 85 Defies the Rate Comparison Required By the Statute.

The argument that "interest" in § 85 means "all charges" conflicts with this Court's holdings in *National Bank v. Johnson,* 104 U.S. at 277 ("The sole particular in which national banks are placed on an equality with natural persons is as to the rate of interest, and not as to the character of contracts they are authorized to make") and *Evans v. National Bank,* 251 U.S. 108, 111 (1919) ("[The National Bank Act] adopts usury laws of the States only in so far as they severally fix the rate of interest"). In those cases, the Court ruled that § 85 refers to state law only for the "*rate*" and not for the character of the contracts signed by national banks. Late fees obviously cannot be measured by a "rate" because they only occur after a payment has been missed and are unrelated either to the amount of the payment or the amount of the outstanding balance. To define "interest" as all lending charges is to read the word "rate" right out the statute.

A definition of "interest" that includes "all charges" is

logically flawed because it would place hundreds of national banks in an untenable position. In the vast majority of states that have precise interest rate limits, national banks could not be certain of their compliance with § 85 because some of the lending charges would be within the borrower's control. A bank could not possibly know whether the ultimate interest rate on any given loan would exceed the home state's usury ceiling, because a borrower could always render the loan unlawful simply by incurring late charges.

The decision below creates the same quandary with respect to the alternative *rate* ceiling that is pegged to the adjusted Federal Reserve discount rate. *See* 12 U.S.C. § 85.[3] That the lawfulness of a national bank's interest charges is determined by a comparison to this federal discount *rate* is further evidence that Congress did not intend the term "interest" to be construed to include penalty charges. *Cf. Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961) (an important statutory term should be construed consistently with the other terms with which it is associated).

Section 85 permits national banks to charge interest as measured either by the maximum interest rate established in the state where the bank is located or 1% more than the discount rate on 90-day commercial paper charged by the Federal Reserve Bank where the bank is located, whichever is greater. Although "discount" interest is usually paid up front, and "loan" interest is usually paid periodically during the loan term, the elements of the two terms are identical, and interest on a "loan" or on a "discount" must be calculated the same way. *See Nat'l Bank v.*

3. The alternative discount rate measurement was first added to § 85 by a 1933 amendment. *See* Banking Act of 1933, Ch. 89, § 25, 48 Stat. 162, 191. The term "discount rate" has roots extending back to at least the 1700's when it was common practice for the Bank of England to extend loans to the Crown by way of discounting notes or bonds issued by the British government.

Johnson, 104 U.S. at 277 (loans and discounts are "synonyms" and are subject to the same *rate* of interest). The term "discount rate" means a rate *per period of time* for loans or discounts on commercial paper. *See, e.g., Evans v. Nat'l Bank*, 251 U.S. at 114; Brekenridge, *Discount Rates in the United States*, 13 Pol. Sci. Q. 119, 120-22 (Table) (1898) ("*Discount Rates*"), *cited with approval in Marquette*, 439 U.S. at 317.

If "interest" included liquidated late payment penalties, a national bank would be unable to determine whether its "interest" charges complied with the federal discount *rate* ceiling. Rather, a bank's compliance with § 85 would depend on contingent future breaches which it could not predict when the loan contract was made. Thus, the *rate* comparison that is a core component of the statute logically confirms that Congress believed that interest — whether determined by the maximum rate allowed by the home state's usury law or the alternative maximum, adjusted federal discount rate — should be measured over time to compensate the lender for the use of its money.

II.

CONGRESS' INTENT IN CRAFTING § 521'S LIMITED PREEMPTION PROVISION IS PERSUASIVE EVIDENCE THAT THE PREEMPTIVE REACH OF § 85 OF THE NATIONAL BANK ACT IS SIMILARLY LIMITED.

Because Congress intended that § 521 complement § 85, Congress' view of the meaning of § 521 is strong evidence of Congress' understanding of the meaning of § 85. Although "a later Congress' understanding of the legislative intent of an earlier Congress is not binding on the courts, it is entitled to deference." *United States v. Stewart*, 779 F.2d 538, 540 (9th Cir. 1985), *cert. denied*, 484 U.S. 867 (1987). *See also Bell v. New*

Jersey, 461 U.S. 773, 784 (1982) (view of later Congress has persuasive value in determining intent of earlier Congress). Moreover, where, as here, the precise intent of the enacting Congress is obscure, the views of a later Congress regarding that intent "are entitled to significant weight." *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596 (1980). Because § 521's preemptive reach is limited to the usury ceilings imposed by state constitutions and statutes, it is difficult to accept a strained interpretation of § 85 that eradicates common law remedies against unconscionable late payment penalties.

A. Section 521 Must Be Construed As Preempting Only State Usury Ceilings.

In its decision below, the California Supreme Court joined a number of other state and federal courts that have followed the holding and reasoning of the federal First Circuit Court of Appeal's decision in *Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818 (1st Cir.), *cert. denied*, 506 U.S. 1052, 113 S. Ct. 974 (1992) (hereinafter "*Greenwood/Mass.*") In *Greenwood/ Mass.*, the court considered a Massachusetts statute that barred late payment penalties. The court held that this statute was expressly preempted by § 521 of DIDA.

The decisions that have followed the lead of *Greenwood/ Mass.* overlook the fact that § 521 preempts only state *constitutional* or *statutory* limits on the *rate* of interest which state chartered banks can charge. The express terms of § 521's preemption clause confirm that the clause does not reach claims that are based on common law rights. Section 521 states in pertinent part:

> State chartered insured banks . . . may, notwithstanding any State *constitution* or *statute* which is hereby preempted for the purposes of this section, take, receive . . . *interest at a rate* of not more than 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve Bank . . . or *at the rate* allowed by the laws of the State . . . where the bank is located, whichever may be greater.

(Emphasis added).

Section 521 takes precise aim at state constitutions and statutes because state usury limits have always been creatures of statutes or constitutions. As long ago as 1888, the California Supreme Court observed that "[t]he illegality of usury is wholly the creature of legislation. . . ." *Coleman v. Commins*, 77 Cal. 548, 554 (1888). Professor Ackerman likewise explains that:

> [i]n the United States, the tradition of *statutory* limitations on interest rates dates back to Colonial times. Forty-six states still retain rate ceilings. American usury laws were modeled on the Statute of Anne (1713), itself derived from still earlier legislation and debate."

J.M. Ackerman, *Interest Rates and the Law: A History of Usury*, 1981 Ariz. St. L.J. 61, 62 (emphasis added).

Petitioner Smiley's theories of liability are not based on legislative or constitutional usury ceilings. For example, although Ms. Smiley's complaint refers to the codified version of the liquidated damages rule in § 1671, Cal. Civ. Code, she may also elect to pursue the common law remedy for unlawful liquidated damages. *See Rojo v. Kliger*, 52 Cal. 3d 65, 79, 276

Cal. Rptr. 130 (1990) (plaintiff may elect to pursue common law remedy even when statutory remedy exists). A claim that a late charge constitutes unlawful liquidated damages is a common law claim. Indeed, a California Court of Appeal recently held in a class action challenge to a credit card late payment fee that the original codification of the liquidated damages rule "did not create new law but simply codified the existing common law." *Beasley v. Wells Fargo Bank*, 235 Cal. App. 3d 1383, 1398, 1 Cal. Rptr. 2d 446 (1992). Moreover, although § 1671 was amended in 1977 to include new rules regarding liquidated damages in non-consumer contexts, the *Beasley* court held that the 1977 statute nevertheless "retain[ed] the former codified common law rule for consumer actions [¶1671(d)]." *Id.* at 1399.

Because Congress only intended to afford state banks parity of treatment with respect to state *usury* limits, the modern Congress correctly confined § 521's preemptive effect to state *constitutions* and *statutes*. Because petitioner's challenge is anchored in a common law, non-usury remedy, her action would not be preempted if directed at a state bank. The same conclusion must apply to her claims against a national bank because § 521 draws its meaning from § 85. *Greenwood/Mass., supra,* 971 F.2d at 826-27.

B. In Deference To Reserved State Powers, § 521's Express Preemption Provision Must Be Construed As Not Preempting Common Law Claims.

In *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 112 S. Ct. 2608 (1992), this Court rejected an attempt to construe an express preemption provision which referred, at best, to statutory enactments, as also embracing common law claims.[4]

4. Although a statute can either expressly or impliedly preempt state law, § 521 of DIDA is an *express* preemption statute. When, as in § 521, (Cont'd)

Cipollone is highly relevant to the issue before this Court: *viz:* whether the express preemption provision contained in section 521 of DIDA also extends to common law claims.

In *Cipollone,* this Court looked at a preemption statute contained in the Federal Cigarette Labelling and Advertising Act, Pub. L. 89-92, 79 Stat. 282, as amended, 15 U.S.C. §§ 1331-1336 (the "1965 Act") and a later version of that provision contained in the Public Health Cigarette Smoking Act of 1969, Pub. L. 91-222, 84 Stat. 87, as amended, 15 U.S.C. §§ 1331-1340 (the "1969 Act"). The preemption provision in the 1965 Act read as follows:

> (a) No statement relating to smoking and health [other than a federally approved statement] . . ., shall be required on any cigarette package, . . . (b) No [such statement . . . shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with [federal law].

Cipollone, 505 U.S. at 534 (quoting 1965 Act). The tobacco companies argued that this provision preempted common law claims which would have imposed liability on them for failing to provide sufficient warnings to smokers about the hazards of cigarette smoking.

This Court disagreed. The Court held that the statute's

(Cont'd)
Congress has expressly addressed the issue of preemption, there ordinarily is no cause to look beyond the express language of the preemption statute. *Cipollone,* 505 U.S. at 517 [112 S.Ct. at 2618]. Even the First Circuit in *Greenwood/Mass.* eschewed implied preemption analysis because it acknowledged that § 521 contains an express preemption provision. 971 F.2d at 823.

reference to positive "requirements" could only be read as referring to *statutory* enactments and therefore refused to read the statute as preempting common law claims. *Id.* at 518-519. The *Cipollone* Court began its analysis of the scope of this provision by affirming that a state's " 'historic police powers [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress.' " *Id.* at 516, quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). The Court held that preemption provisions must be construed:

> in light of the presumption *against* the preemption of state police power regulations. This presumption reinforces the appropriateness of a narrow reading of [the express preemption provision].

Id. at 518.

It is important to note that under its express preemption analysis, this Court read the 1965 Act "narrowly." In so doing, this Court concluded that the language preempting state-imposed "requirements" could only be construed as preempting "positive enactments by *legislatures* or administrative agencies that mandate particular warning labels." *Id.* at 519 [emphasis added]. Thus, because the preemption provision referred, at best, *only* to statutory enactments, it could not be read as eradicating common law remedies. *Id.*

Section 521 is a far simpler statute to construe than the 1965 Act that confronted the *Cipollone* Court. In *Cipollone*, the Court had to determine whether the term "required" referred only to legislation or was broad enough to include common law claims. Guided by the principle that an express preemption provision must be read narrowly, the Court ruled that the term "required" must be limited to legislative enactments. Here, because § 521

refers explicitly *only* to "State *constitution[s]* or *statute[s]*," it is absolutely clear that state common law claims do not fall within the express preemption language of § 521.

The *Cipollone* Court also looked at a later version of the express preemption provision contained in the 1969 Act, and a plurality of the court held that this provision *did* preempt common law claims. The court's discussion of this provision is, therefore, instructive in determining the sort of language Congress must use before a court may hold that a common law claim is expressly preempted.

The 1969 Act contained a preemption provision that read as follows:

> No requirement or prohibition based on smoking and health shall be imposed *under State law* with respect to the advertising or promotion of any cigarettes the packages of which are [lawfully labelled under federal law].

Cipollone, 505 U.S. at 515 (emphasis added). Four justices concluded that the broad reference to "State law" contained in the 1969 Act did encompass state common law as well as state statutes. *Id.* at 523 (plurality opinion). Another three justices vigorously disagreed with this reading of the phrase "State law" because they still were not satisfied that this language was sufficiently explicit so as to include state common law claims. *Id.* at 538-539 (Blackmun, J., concurring in part and dissenting in part). It is quite clear, however, that all seven justices concluded that a state's common law will not be preempted unless the language of the preemption statute expressly states Congress' intention to do so.

It is also clear that § 521 of DIDA cannot be construed as preempting common law remedies because Congress explicitly chose to limit its preemptive reach to state constitutions and statutes, that is, to state usury laws. In holding that the 1969 Act's preemption provision embraced common law rights, the *Cipollone* plurality emphasized that the term "state law" replaced the terms "any state *statute or regulation*" [original emphasis] which appeared in an earlier version of the bill which was originally enacted. By contrast, § 521 uses essentially the same words which the *Cipollone* majority equated with an intention *not* to preempt common law. Under *Cipollone,* therefore, section 521, and by extension, § 85, cannot be read to include any of petitioner Smiley's claims because these claims are grounded in California common law.

C. DIDA's Legislative History Confirms That Congress Deliberately Limited Section 521's Preemptive Scope To State Usury Ceilings.

As explained above, the express language of § 521 defeats the banks' contention that the statute shields their campaign to destroy the traditional common law protections against unconscionable liquidated penalties. Any venture into the purpose and effects of preemption constitutes an *implied* preemption analysis that has marginal relevance to an *express* preemption provision. Nevertheless, the Court need not look far to find ample evidence that Congress quite deliberately chose not to tamper with a state's traditional power to protect its citizens from excessive liquidated penalties.

1. Background Of Part V Of DIDA: The 1970s' Credit Crunch

In the 1970's, the United States economy experienced a period of severe inflation and recession which caused a dramatic

rise in interest rates. The federally chartered banks easily weathered this storm because § 85 allowed their lending rates to rise with the inflation sensitive federal discount rate. By contrast, the state chartered lenders were trapped in an ever tightening vise between the higher interest rates they had to pay to procure money and the relatively low usury ceilings imposed by their state constitutions or statutes.[5] This credit crunch, which placed state lenders at an extreme competitive disadvantage vis-a-vis federally chartered lenders, set the stage for DIDA. *E.g.*, S. Rep. No. 368, 96th Cong., 1st Sess. 18 (1979), *reprinted in* 1980 U.S.C.C.A.N. 236, 254.

2. DIDA's Broadest Provision, Section 501, Excludes Late Charges.

The first provision of Title V of DIDA, and the first to be considered by Congress, is section 501. With respect to home mortgage loans, § 501(a)(1), 12 U.S.C. §1735f-7a, expressly preempts:

> The provisions of the constitution or the laws[6] of any State expressly limiting *the rate or amount of interest, discount points, finance charges, or other charges which may be charged. . . .*

5. Insofar as a state chartered lender depended on time deposits, this source of lending capital quickly dried up as depositors turned to money market accounts and other sources of interest income that were not hampered by usury limits.

6. Section 501(a)(1)'s use of the term "laws" as a preemption defining term was not intended to encompass state common law rules. In explaining the purpose of § 501(a)(1), the Senate Banking Committee report declared that the provision "would preempt any State *constitutional or statutory* provision setting a limit on mortgage interest rates." S. Rep. 96-368, *supra,* at 18, 1980 U.S.C.C.A.N. at 254.

Unlike § 521 and other provisions of Title V, § 501(a)(1) draws a distinction between "the rate or amount of interest" on the one hand and both specified and unspecified "other charges" on the other.[7] In explaining the meaning of this provision, Congress never imagined that late fees would be included in the term "rate or amount of interest." However, Congress was concerned about the possibility that state regulation of late fees might be preempted on the theory that late fees were a species of "other charges." It was to allay this fear that the Senate Banking Committee pointedly declared that § 501(a)(1) did not preempt "limitations on . . . late charges or similar limitations designed to protect borrowers." S. Rep. No. 96-368, *supra*, at 19, 1980 U.S.C.C.A.N. at 255.[8]

3. *Sections 511, 521, 522, And 523 of Title V All Have The Same Express Preemption Clause That Is Aimed At State Usury Ceilings.*

After the Senate amended DIDA in 1979 to include what became § 501, the Senate subsequently added other provisions that similarly preempted state usury ceilings on other types of loans. Four of these provisions, §§ 511, 521, 522, and 523, included preemption clauses which, with immaterial differences, contain the following identical terms:

> If the applicable rate specified in this [provision] exceeds the rate [the lender] would be permitted to charge in the absence of this [provision], such [lender] may, notwithstanding any *State constitution or statute* which is hereby preempted for the purposes of this [provision], . . . charge on any loan. . . .

7. The distinction is quite deliberate as shown by the fact that subdivision (a)(2) of § 501, which pertains to interest bearing deposits, refers only to "the rate or amount of interest" without any mention of "other charges."

8. *See also* H.R. Conf. Rep. N. 842, 96th Cong. 69,79 (1980), *reprinted in* 1980 U.S.C.C.A.N. 299, 309 (stating that regulations of Federal Home Loan Bank Board would not preempt stronger state law protections against late fees — therefore reconfirming that state late fee laws survived preemption under § 501(a)(1).

(Emphasis added). The legislative history of these identical texts shows that the underscored terms were repeatedly used to refer to state usury ceilings.

The underscored verbal formula appears to have first been used in the 1974 Brock Act, §§ 202 and 203, 12 U.S.C. § 1831a(a) et al., Title II, Pub. L. No. 93-501, 88 Stat. 1557. The heading of the Brock Act speaks for itself: "TITLE II — INTEREST RATE AMENDMENTS REGARDING *STATE USURY CEILINGS* ON BUSINESS LOANS." [Emphasis added.] Moreover, in explaining a companion provision[9] of the same Act that temporarily amended Section 85, Congress declared:

> Although the Committee concluded that evidence before it justified Federal action of an emergency nature as envisioned here, it is concerned that this action not be construed as

9. Pub. L. No. 93-501 § 201. The amendment allowed national banks to charge interest on certain business and agricultural loans at a rate of 5 percent above the local federal discount rate. The amendment expired on July 1, 1977, because it was intended only to relieve lending pressure in three states, Arkansas, Tennessee and Montana, and to allow those states enough time to change their statutory or constitutional interest rate ceilings, which were then below prevailing rates. *See* S. Rep. No. 1120, 93d Cong., 3d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 6249, 6260. Those statutory and constitutional ceilings did not apply to late fees and, therefore, Congress never preempted the late fee limitations in those states.

> reflecting Federal policy of overriding state law in this area, *especially with respect to consumer and home mortgage loans.*

1974 U.S.C.C.A.N. at 6261 (emphasis added). There can therefore be no doubt that Congress carefully chose the words "constitution or statute" in order to avoid any impact on traditional consumer protection laws that are separate and distinct from state usury ceilings.

In fashioning the four provisions of Part V of DIDA, Congress adopted the Brock Act's terminology to achieve the same limited purpose. Although the text of §§ 511, 521, 522, and 523 were originally included in Senate Bill 1988, which died in committee, the four provisions were incorporated in Title V of DIDA in early 1980. Burke and Kaplinsky, *Unraveling the New Federal Usury Law,* 37 Bus. Law. 1079, 1096-97 & n. 102. During the Senate Floor debates, Senators Pryor and Bumpers, the authors of S. 1988, and Senator Proxmire, the floor manager, emphasized that the sole purpose of these nearly identical provisions was to eliminate state usury ceilings so that state chartered institutions could benefit from the inflation sensitive federal discount rate, just as their federal bank competitors were free to do under § 85. 125 Cong. Rec. 30655 (Nov. 1, 1979). The preemptive language was surgically confined to constitutional and statutory usury limits because the Senate undoubtedly concurred with Senator Bumpers' observation that it was "not . . . particularly healthy to be overriding state law." *Id.*

The narrow preemptive reach of all of Title V's provisions was again confirmed by the House Conference Report that was issued just a week before DIDA's final passage. This report discusses the Title V provisions under the heading "STATE USURY LAWS" and repeatedly characterizes each of the Title V provisions as preempting "State usury ceilings." H.R. Conf.

Rep. No. 96-842, supra at 78-79, 1980 U.S.C.C.A.N. at 308-09. Finally, during the Senate's discussion of the conference report on March 27, 1980, the day before DIDA was passed by the Senate, Senator Proxmire declared:

> Title V [removes competitive restrictions on state chartered lenders] by preempting various *usury* laws while giving each State the opportunity to re-establish its *usury* limitations if it desires to do so. . . .

126 Cong. Rec. 6900 (Mar. 27, 1980). (Emphasis added).

4. *The Pattern And Common Purpose Of Title V's Provisions Cast An Informative Light On § 521, And Beyond To § 85.*

Examining § 521 in relation to its sister provisions in Title V serves only to confirm the plain meaning of its express preemption clause. If state law protections against liquidated penalties are not preempted by § 501 because late fees are not an "other charge" distinct from the "rate of interest," it follows *a fortiori* that late fees cannot be forcibly merged into the term "rate of interest" in § 521. Congress' strong desire to preserve state laws that protect consumers against unlawful liquidated penalties, as expressed in the October 1979 Senate Banking Report, S. Rep. No. 96-568, *supra,* at 19, cannot be ignored in construing § 521. Although this Senate report was addressed to what became § 501(a)(1), the commitment expressed in this report to preserve consumer protection is relevant to construing the preemptive scope of DIDA as a whole. It is inconceivable that Congress would strive to protect consumers in the context of home mortgage loans but would suddenly bury the goal of consumer protection in the context of the credit card mass market which involves many thousands of people who cannot afford a car, much less a home.

Each provision of a statute must be construed in harmony with the statute's other provisions. *E.g., Massachusetts Mutual Life Insur. Co. v. Russell,* 473 U.S. 134, 147 (1985). A term in one section of a statute must likewise be construed consistently with the same term used in kindred sections of the same statute. *E.g., Firestone v. Howerton,* 671 F.2d 317, 320 n.6 (9th Cir. 1982). In accordance with these principles, it is clear Congress understood that § 521 only preempted constitutional and statutory usury ceilings in order to establish parity between state chartered and federally chartered lenders with respect to the rates of interest they could charge. The Congress of 1980 never imagined that the term "rate of interest" would include liquidated penalties imposed for *delinquent* loan payments. Because the purpose of § 521 was to afford state banks the same protection that national banks enjoyed under § 85, it follows that the 1980 Congress likewise understood that late fees were outside the preemptive reach of § 85.

CONCLUSION

The purposes of § 85 can certainly be accomplished without an "interest" definition that embraces "all charges," including penalty fees. This Court has specifically ruled that all contracts by national banks are "governed and construed by state laws." *Nat'l Bank v. Commonwealth,* 76 U.S. (9 Wall.) 353, (1870); *National Bank v. Johnson,* 104 U.S. at 277. Although this Court has also ruled that the word "located" in 12 U.S.C. § 85 has a firm, federal definition, *Marquette Nat'l Bank v. First of Omaha Service Corp.,* 439 U.S. 299, 312, 313 (1978), it has never ruled that only the contract laws of a bank's home state may be applied to that bank.

A federal common law definition that excludes contingent late payment charges has no effect on intrastate lending by national banks. Because their contracts are governed by state

laws, national banks can utilize the same contractual terms as any other lender in the state. If other lenders are allowed to include late fee provisions in their contracts, there is no reason why a national bank would be prevented from doing the same as an incident to its power to contract. *See* 12 U.S.C. § 24 (Third). Because a national bank would also be free to use the highest interest rate allowed to any lender in the state, it would remain a "most favored lender."

In conclusion, the traditional common law definition of interest is in accord with the text of § 85, the historical setting and purpose of the statute and the precedents that have construed its meaning. This definition is the only definition that is consistent with the text and legislative history of § 521 of DIDA, the lineal descendent of § 85. The traditional definition also coincides with the definition of interest on deposits (*see* 12 U.S.C. §§ 371b, 371a), with the whole foundation for the Truth-In-Lending Act (*see, e.g., Vega v. First Federal S&L Ass'n,* 622 F.2d 918, 922 (6th Cir. 1980)), and with the principle that preemption may not be found in the absence of clear and unambiguous Congressional intent.

On the basis of the foregoing, Amicus submits that there is no credible proof, much less clear and unambiguous proof that § 85 was intended to eradicate age-old state law remedies that operate in a traditional field of state governance. Amicus, therefore, asks that the decision below be reversed.

Respectfully submitted,

KENNEDY P. RICHARDSON
Counsel of Record
SAM WALKER
ALBERT LEE
MARION'S INN
Attorneys for Amicus Curiae
Bankcard Holders of America
Latham Square
1611 Telegraph, Suite 707
Oakland, California 94612-2145
(510) 451-6770